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Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure

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ANTITERRORISM MILITARY COMMISSIONS: THE AD HOC DOD RULES OF PROCEDURE

· Jordan J. Paust*

I. SEVERAL SERIOUS VIOLATIONS HAVE BEEN CONTINUED	678
II. DENIAL OF THE RIGHT TO JUDICIAL REVIEW OF DETENTION.....	679
III. DENIAL OF THE RIGHT TO REVIEW BY A COMPETENT, INDEPENDENT, AND IMPARTIAL COURT	685
IV. DENIAL OF THE RIGHT TO TRIAL BEFORE A REGULARLY CONSTITUTED, COMPETENT, INDEPENDENT, AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW	687
V. DENIAL OF THE RIGHTS TO FAIR PROCEDURE AND FAIR RULES OF EVIDENCE	688
VI. DENIAL OF THE RIGHT TO COUNSEL AND TO EFFECTIVE REPRESENTATION.....	690
VII. A RECENT FEDERAL COURT DECISION CONCERNING HABEAS CORPUS.....	690
VIII. CONCLUSION	694

While the article *Antiterrorism Military Commissions: Courting Illegality*¹ was set for publication, the Department of Defense formally issued its first set of Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism.² The President's November 13th Military Order had set up several per se violations of international law.³ Instead of attempting to avoid them, the DOD Order of March 21, 2002 continued the violations, set up additional violations of international law, and created various rules of procedure and evidence that, if not per se violative of international law, are highly problematic. What follows is a selective commentary on various ad hoc⁴ rules of procedure and evidence set forth in the DOD Order.

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1. Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001).

2. Dep't of Def. Military Comm'n Order No. 1 (Mar. 21, 2002) [hereinafter DOD Order], <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

3. See Paust, *supra* note 1, at 10–17, 25–26.

4. They are ad hoc because they can be changed at any time. DOD Order, *supra* note 2, §§ 1, 7(A), 11.

I. SEVERAL SERIOUS VIOLATIONS HAVE BEEN CONTINUED

The present DOD rules continue intentional and per se discrimination on the basis of national or social origin,⁵ intentional and per se denial of equal protection,⁶ and "denial of justice" to aliens in violation of various international laws.⁷ Nearly every impropriety concerning the Peruvian military commissions addressed by the Inter-American Court of Human Rights has been built into the Bush military commissions.⁸ In particular, under the DOD Order, civilians may not be tried in civilian courts, the accused have been detained for months without charges, detainees do not enjoy the right to be brought promptly before a judge or to file habeas corpus petitions, defense attorneys will lack access to some witnesses, accused will not be able to cross-examine all witnesses against them, portions of trials can be held in secret, and accused lack the right of appeal to an independent and impartial tribunal. Furthermore, most of the customary minimum due process requirements reflected, for example, in article 14 of the International Covenant on Civil and Political Rights,⁹ have been spurned.¹⁰ In particular, and as explained in part below, there will be a denial of a "fair and public hearing

5. See Paust, *supra* note 1, at 17 & n.37, 25 (addressing the prohibition of national or social origin discrimination under the U.N. Charter and customary human rights law); Michael J. Kelly, Essay, *Understanding September 11th—An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283, 289–90 (2002) ("The illegal nature of [President Bush's Military] order only serves to perpetuate a sense of unfairness.").

6. See Paust, *supra* note 1, at 17 & nn.38–39, 25 (addressing the prohibition of a denial of equal protection under customary and treaty-based human rights law and bilateral treaties of friendship, commerce, and navigation).

7. See *id.* at 12 & n.26, 25 (addressing the customary prohibition of "denial of justice" to aliens and identifying various relevant examples).

8. Cf. *id.* at 10 & n.20 (discussing the opinion of the Inter-American Court and human rights violations by Peruvian Military Commissions in the Castillo Petruzzi Case (Merits), Judgment, Inter-Am. Ct. H.R., ser. C, No. 52 (1999)).

9. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 176 [hereinafter ICCPR]. Customary human rights to due process are also incorporated by reference as nonderogable rights of all detainees, regardless of status, in common article 3(1)(d) of the 1949 Geneva Conventions. Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3115, 3118, 75 U.N.T.S. 31, 35; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick or Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3222, 75 U.N.T.S. 85, 88; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 138 [hereinafter GPW]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3520, 75 U.N.T.S. 287, 290 [hereinafter Geneva Civilian Convention]; see, e.g., Paust, *supra* note 1, at 7 n.15, 12 n.26; see also ANNOTATED SUPPLEMENT TO COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 490 n.47 (Naval War College, Int'l L. Studies vol. 73, A.R. Thomas and James C. Duncan eds., 1999) ("GPW is the universally accepted standard for treatment of PWs; virtually all nations are party to it and it is now regarded as reflecting customary law.").

10. See Paust, *supra* note 1, at 10–15 and references cited.

by a competent, independent and impartial tribunal established by law," detainees have not been "informed promptly and in detail . . . of the nature and cause" of any charges against them, an accused will not fully enjoy the right to "counsel of his choosing," an accused will not fully enjoy the right "[t]o be tried in his presence" or to "defend himself . . . through legal assistance of his own choosing," an accused will not fully enjoy the right "[t]o examine, or have examined, the witnesses against him," and an accused will not enjoy "the right to his conviction and sentence being reviewed by a higher tribunal according to law." As noted below, various other due process guarantees under human rights law, the laws of war, and other international laws will also be violated if the DOD rules are followed.

II. DENIAL OF THE RIGHT TO JUDICIAL REVIEW OF DETENTION

The DOD rules reflect an intentional denial of the customary and nonderogable human right to take proceedings before a court exercising judicial power in order to determine the lawfulness of one's detention and to order release of the person if detention is not lawful.¹¹ For example, no provision exists in the President's Military Order or the DOD rules for review of detention by a federal district court. The only "review" provided in the DOD rules involves perfunctory review of a military commission's decision by the Appointing Authority¹² of the record of trial to assure that the "proceedings of the Commission

11. See, e.g., ICCPR, *supra* note 9, art. 9(4), 999 U.N.T.S. 171, 176; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5(3)–(4), 213 U.N.T.S. 221, 226; American Convention on Human Rights: Pact of San José, Costa Rica, Nov. 22, 1969, art. 7(5)–(6), 1144 U.N.T.S. 123, 147 (1969); American Declaration of the Rights and Duties of Man, arts. XVIII, XXV, XXVI, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/ser. L/V/I.4, rev. (1965); Universal Declaration of Human Rights, art. 10, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948). Concerning nonderogability of this right, see, for example, U.N. GAOR, Hum. Rts. Comm., General Comment No. 29, 73d Sess., 1950th mtg. ¶¶ 11, 16, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001); Amnesty Int'l, Memorandum to the U.S. Government on the Rights of People in U.S. custody in Afghanistan and Guantanamo Bay, 6 & n.16, 44–47 (Apr. 15, 2002) [hereinafter Amnesty Int'l, Memorandum], available at <http://web.amnesty.org/aidoc> (discussing the prospect of indefinite detention without trial or after acquittal); see also U.N. GAOR, Hum. Rts. Comm., 63d Sess., 1694th mtg. ¶ 21, U.N. Doc. CCPR/C/79/Add.93 (1998) (a state "may not depart from the requirement of effective judicial review of detention"). See generally *supra* note 9 and accompanying text.

12. The Appointing Authority will be a "designee" of the Secretary of Defense: "In accordance with the President's Military Order, the Secretary of Defense or a designee ('Appointing Authority') may issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials." DOD Order, *supra* note 2, § 2.

were administratively complete,”¹³ possible limited “review” and “recommendations” to the Secretary of Defense by a Review Panel of military officers (only one of whom presumably must be a lawyer since only one of the members of the panel must “have experience as a judge”),¹⁴ and “review” by the Secretary of Defense¹⁵ with “final decision” by the Secretary of Defense or the President.¹⁶ The Review Panel may not overturn a conviction, reverse or amend a decision, or order dismissal or release of the person (or order anything else), since it “shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings” if a majority of the Panel (which could be the non-lawyer officers) decides “that a material error of law occurred.”¹⁷ Section 7(B) of the DOD rules also attempts to assure that there will be no other form of review, including habeas corpus

13. *Id.* § 6(H)(3).

“Review by the Appointing Authority. If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4). If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.”

Id.

14. This allows the one lawyer on a Review Panel to be overruled by non-lawyers reviewing issues concerning the identity, interpretation, and application of relevant law and a decision whether a “material error” of law occurred. *Id.* § 6(H)(4).

“The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within thirty days after receipt of the record of trial, the Review Panel shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.”

Id.

15. *Id.* § 6(H)(5).

“Review by the Secretary of Defense. The Secretary of Defense shall review the record of trial and the recommendations of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of the President’s Military Order, forward it to the President with a recommendation as to disposition.”

Id.

16. *Id.* § 6(H)(2), (6).

17. *Id.* § 6(H)(4).

review, since it provides that “[i]n the event of any inconsistency between the President’s Military Order and this Order . . . the provisions of the President’s Military Order shall govern,”¹⁸ and the President’s Military Order openly attempted to preclude all judicial review, including all access to Article III courts and any use of habeas corpus.¹⁹

As noted previously, denial of the right to habeas corpus is impermissible under customary human rights law²⁰ and also violates rights under human rights and other international laws providing for equal protection.²¹ These denials are particularly serious with respect to possible use of military commissions at Guantanamo Bay, Cuba, because U.S. military commissions have lawful jurisdiction only during war either in a war zone or in war-related occupied territory²² and Guantanamo is clearly outside any war zone or war-related occupied territory.²³

It may be shocking to some, but during an international armed conflict or war-related occupation “a Party to the conflict” or an occupying power, in its territory or in occupied territory, can intern certain persons without trial if such persons are “definitely suspected of or engaged in activities hostile to the security of the State.”²⁴ Internment

18. *Id.* § 7(B).

19. See Paust, *supra* note 1, at 15 & n.34, 21 (addressing relevant language in the Military Order and various human rights and laws of war at stake; referring to decisions of the European Court of Human Rights, the Supreme Court of Canada, and the African Commission on Human and Peoples’ Rights; a U.N. Secretary-General report; and U.S. Dep’t of State Country Reports). International law and proper interpretation of the habeas corpus statute require that habeas corpus remain available, despite the Bush Administration’s attempt to deny review and a recent district court ruling in accord. See discussion *infra* Section VII (commenting on the district court opinion in *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002)).

20. See Paust, *supra* note 1, at 10; see also *Habeas Corpus in Emergency Situations*, Inter-Am. Ct. H.R., ser. A, No. 8, ¶¶ 38, 41–42 (1987) (“[H]abeas corpus and . . . ‘amparo’ are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited.”), addressed in RICHARD B. LILlich & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS* 927–28 (3d ed. 1995).

21. See Paust, *supra* note 1, at 18, 21, 25–26.

22. See, e.g., *id.* at 5 & n.14, 26–27. For additional cases, see, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (“occupied enemy territory”); *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132–33 (1869) (“wherever the insurgent’s power was overthrown,” “so long as the war continued,” “during war”).

23. See Paust, *supra* note 1, at 25 & n.70, 26 (discussing the U.S.-Cuba treaty regime regarding Guantanamo Bay).

24. Geneva Civilian Convention, *supra* note 9, art. 5, 6 U.S.T. at 3520, 75 U.N.T.S. at 290. Guantanamo does not appear to be an appropriate territory within the meaning of article 5, since it is not technically U.S. territory, although it is close to such a status, and it is not war-related occupied territory. See Paust, *supra* note 1, at 25 n.70. If so, detention at Guantanamo would be impermissible. Moreover, transfer of non-prisoners of war out of any U.S. occupied territory in Afghanistan would be a war crime. See, e.g., Geneva Civilian Convention, *supra* note 9, arts. 49, 76, 147, 6 U.S.T. at 3548, 3566, 3618, 75 U.N.T.S. at 319, 336, 388; Paust, *supra* note 1, at 24 n.68.

without trial can last for the duration of the international armed conflict or occupation,²⁵ but detainees are to be released sooner if detention is no longer required for definite security reasons. Release must occur upon termination of the armed conflict or occupation and, in any event, "at the earliest date consistent with the security of the State or Occupying Power"²⁶ While such persons are being detained, "[i]n each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by" the Geneva Convention Relative to the Protection of Civilians in Time of War.²⁷ Common article 3 is part of the Convention and now applies in all armed conflicts, and thus customary human rights to due process that are incorporated therein by reference supplement other due process provisions contained in the Convention.²⁸ Whether they are to be prosecuted or merely detained as security threats, each detainee has a right under customary human rights law to obtain judicial review of the propriety of their detention. Moreover, persons detained by the United States at Guantanamo or in Afghanistan who are suspected or accused of crimes have not enjoyed the right to be informed promptly and in detail of the nature and cause of any charges against them and to communicate with counsel of their choosing.²⁹

DOD statements concerning the goals of detainee internment and interrogation have shifted between attempts to prosecute those accused of crimes, attempts to detain certain persons as security threats, and attempts at information gathering for the purposes of prosecuting others or for more general intelligence purposes.³⁰ There are even suggestions that,

25. Geneva Civilian Convention, *supra* note 9, art. 6, 6 U.S.T. at 3522, 75 U.N.T.S. at 292 (application of the Convention in the territories of parties to the conflict, and thus rights and competencies of the detaining power thereunder, "shall cease on the general close of military operations").

26. *See id.* art. 5, 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

27. *Id.* Members of the armed forces of the Taliban should be treated as prisoners of war under the Geneva Convention Relative to the Treatment of Prisoners of War. GPW, *supra* note 9, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40. *See, e.g.,* Paust, *supra* note 1, at 7 n.15. Prisoners of war are to be "released and repatriated without delay after the cessation of active hostilities." GPW, *supra* note 9, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224. However, prisoners of war may be detained if they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving a sentence. *Id.* art. 119, 6 U.S.T. at 3408, 75 U.N.T.S. at 226; *see id.* arts. 85, 99, 129, 6 U.S.T. at 3384, 3392, 3418, 75 U.N.T.S. at 202, 210, 236; *United States v. Noriega*, 746 F. Supp. 1506, 1526 (S.D. Fla. 1990).

28. *See supra* note 9 and accompanying text.

29. *See, e.g., supra* notes 8–11 and accompanying text; Amnesty Int'l, Memorandum, *supra* note 11, at 28–30.

30. *See, e.g.,* Amnesty Int'l, Memorandum, *supra* note 11, at 28–29, 43–46; Warren Richey, *How Evidence Stacks Up on Military Tribunals*, CHRISTIAN SCI. MONITOR, Mar. 22, 2002, at 3; Carol Rosenberg, *Base's New Chief Calls Captives 'Killers'*, MIAMI HERALD, Apr. 10, 2002, at 9A (General says Pentagon guidelines for detainees 'not really' of concern); Katharine Q. Seelye, *Pentagon Says Acquittals May Not Free Detainees*, N.Y. TIMES, Mar. 22,

given the lack of sufficient evidence for prosecution of many of the detainees for crimes, they should be interned without trial or judicial review for as long as they are “dangerous.”³¹ One problem with such a strategy is that detention of non-prisoners of war authorized under the Geneva Civilian Convention and detention of prisoners of war must end when the international armed conflict in Afghanistan ends.³² The United States cannot be at “war” with al Qaeda as such,³³ there or in other countries. The threshold of “armed conflict” under common article 2 of the Geneva Conventions, which triggers application of the detaining power’s competence under article 5 of the Geneva Civilian Convention to intern certain persons, cannot be met if the United States is merely fighting members of al Qaeda. Other problems for those seeking prosecution include the fact that (1) mere membership in an organization (like al Qaeda) is not a crime;³⁴ (2) acts of warfare engaged in by members of the armed forces of a party to an international armed conflict (begun on October 7, 2001, in Afghanistan) are entitled to immunity from prosecution if their acts are not otherwise violative of international law³⁵ and, thus,

2002, at A13 [hereinafter Seelye, *Pentagon*]; Katharine Q. Seelye, *Rumsfeld Backs Plan to Hold Captives Even if Acquitted*, N.Y. TIMES, Mar. 29, 2002, at A12; see also *infra* note 31 and accompanying text. One news report states that the United States is not releasing the names of detainees or even confirming names identified by countries of nationality of the detained persons. See, e.g., Katharine Q. Seelye, *Moscow, Seeking Extradition, Says 3 Detainees Are Russian*, N.Y. TIMES, Apr. 3, 2002, at A11. The International Committee of the Red Cross (ICRC) Commentary recognizes that the detaining power has obligations to transmit “particulars of any protected person who is kept in custody for more than two weeks” to an official Information Bureau, which does not exist but some of whose functions can be performed by the ICRC. See 4 INT’L COMM. OF THE RED CROSS, COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 56 (Jean S. Pictet & ICRC eds., Major Ronald Griffin et al. trans., 1958) [hereinafter 4 ICRC COMMENTARY].

31. See, e.g., Warren Richey, *How Long Can Guantanamo Prisoners Be Held?*, CHRISTIAN SCI. MONITOR, Apr. 9, 2002, 1, 4 (quoting Deputy Ass’t Att’y Gen. John Yoo: “Does it make sense to ever release them if you think they are going to continue to be dangerous even though you can’t convict them of a crime?”); Stuart Taylor, *Al Qaeda Detainees: Don’t Prosecute, Don’t Release*, 34 NAT’L J. 1203 (2002).

32. See *supra* notes 25, 27 and accompanying text.

33. See, e.g., Paust, *supra* note 1, at 8 n.16 (noting that bin Laden was not the leader of a State, nation, belligerent, or insurgent group; that al Qaeda did not meet even the criteria needed for insurgent status; and that war or armed conflict between the United States and al Qaeda can only occur under international law if al Qaeda has the status of a belligerent or insurgent); see also *Pan American Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1013–15 (2d Cir. 1974) (United States could not have been at war with the Popular Front for the Liberation of Palestine, which had engaged in terrorist acts as a non-State, non-belligerent, and non-insurgent actor).

34. See, e.g., JORDAN J. PAUST, M. CHERIF BASSIOUNI, ET AL., INTERNATIONAL CRIMINAL LAW 43–46 (2d ed. 2000) and references cited.

35. This is a form of “combat immunity” with respect to lawful acts of warfare. See, e.g., *In re Yamashita*, 327 U.S. 1, 47 (1946) (Rutledge, J., dissenting) (“we have no question here of what the military might have done in a field of combat The purpose of battle is to kill.”); MANUAL FOR COURTS-MARTIAL UNITED STATES II-111 (2000) (Rule 916(c), discussion:

"killing an enemy combatant in battle is justified"); FRANCOISE BOUCHET-SAULNIER, *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* 50 (2002) ("Combatants are persons who are authorized to use force. As long as their use of force is in conformity with the provisions of the laws of war, they may not be subject to criminal pursuit."); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 712 (1961) ("[A]cts committed in war by enemy civilians and members of armed forces may be punished as crimes under a belligerent's municipal law only to the extent that such acts are violative of the international law on the conduct of hostilities. Clearly the rule of warfare would be pointless . . . if every single act of war may by unilateral municipal fiat be made a common crime and every prisoner of war executed as a murderer. International law delineates the outer limits of the liability of supposed war criminals; and conformity with that law affords a complete defense for the violent acts charged."); TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 19–20 (1970) ("War consists largely of acts that would be criminal if performed in time of peace . . . Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors. But the area of immunity is not unlimited, and its boundaries are marked by the laws of war."); *see also* European Convention for the Protection of Human Rights, *supra* note 11, art. 15(2), 213 U.N.T.S. at 232 (derogations from the "right to life" are permissible "in respect of deaths resulting from lawful acts of war"); United States v. List, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 757, 1236, 1246 (1950); United States v. Ohlendorf, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1, 492–93 (1949) ("Many of the defendants seem to assume that by merely characterizing a person a partisan, he may be shot out of hand. But it is not so simple as that. If the partisans are organized and are engaged in what international law regards as legitimate warfare . . . they are entitled to be protected as combatants The language used in the official German reports . . . show[s], however, that combatants were indiscriminately punished only for having fought against the enemy. This is contrary to the laws of war."); United States v. Noriega, 746 F. Supp. 1506, 1529 (S.D. Fla. 1990) ("the essential purpose of [GPW] is to protect prisoners of war from prosecution for conduct which is customary in armed conflict," not "to provide immunity against prosecution for common crimes committed against the detaining power before the outbreak of hostilities" or "activities which have no bearing on the conduct of battle or the defense of country"); Arce v. State, 202 S.W. 951, 953 (Tex. Crim. App. 1918) (four soldiers under command of the de facto government of Mexico who killed a U.S. Army corporal during hostilities could not be lawfully convicted for such conduct); United States v. Calley, 22 C.M.A. 534, 540 (1973) ("[I]t is lawful to kill an enemy in the heat and exercise of war . . .") (quoting Digest of Opinions of the Judge Advocate General of the Army 1074–75 n.3 (1912)); U.S. ARMY TJAG SCHOOL, *OPERATIONAL LAW HANDBOOK* 12 (2002), at <http://www.jagcnet.army.mil> ("Combatants. Anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict . . . Lawful Combatants. Receive protections of Geneva Conventions . . . gain 'combatant immunity' for their warlike acts . . ."); ANNOTATED SUPPLEMENT TO COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 9, at 490 n.47 ("The rights and obligations of PWs are detailed in GPW. The Convention's underlying philosophy is that PWs should not be punished merely for having engaged in armed conflict."); ANNOTATED SUPPLEMENT TO COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 9, at 492 ("Prisoners of war may not be punished for hostile acts directed against opposing forces prior to capture, unless those acts constituted violations of the law of armed conflict."); INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDERS NO. 100, at 15 (Prepared by Francis Lieber, 1863) [hereinafter Lieber Code] (art. 49: "[a]ll soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war . . . are prisoners of war . . ."); Lieber Code, *supra*, at 17 (art. 56: "[a] prisoner of war is subject to no punishment for being a public enemy," and art. 57: "[s]o soon as a man is armed by a sovereign government and takes the soldier's oath of

lawful combat training and actions of members of the armed forces of the Taliban (and perhaps members of al Qaeda units attached to the armed forces of the Taliban) during the armed conflict in Afghanistan are privileged belligerent acts entitled to combat immunity and cannot properly be criminal, elements of a domestic crime, or acts of an alleged conspiracy; and (3) al Qaeda attacks on the United States on September 11th (before the international armed conflict in Afghanistan began) cannot be privileged belligerent acts but also cannot be prosecuted as war crimes because the United States and al Qaeda cannot be "at war" under international law.³⁶

III. DENIAL OF THE RIGHT TO REVIEW BY A COMPETENT, INDEPENDENT, AND IMPARTIAL COURT

The preceding violations are also relevant to the more general and blatant denial of the customary and nonderogable right to appeal to a competent, independent, and impartial court.³⁷ No such right of appeal

fidelity, he is a belligerent; his killing, wounding, or other warlike acts, are not individual crimes or offenses."); THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 68 (Dieter Fleck ed., 1995) (mere civilians who are not members of the armed forces can be prosecuted for unlawful or unprivileged participation in an armed conflict); 4 ICRC COMMENTARY, *supra* note 30, at 53 ("irregular combatants" are "[t]hose who take part in the struggle while not belonging to the armed forces [and] are acting deliberately outside the laws of warfare."); 3 INT'L COMM. OF THE RED CROSS, COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 417-22 (Jean S. Pictet & ICRC eds., A.P. de Heney trans., 1960) (precapture offenses for which a prisoner of war can be prosecuted under domestic law include only (1) acts not part of or related to the armed conflict, and (2) acts related to the conflict that constitute war crimes, crimes against peace, or crimes against humanity); Major Geoffrey S. Korn & Major Michael L. Schmidt, "To Be Or Not To Be, That Is The Question": *Contemporary Military Operations and The Status of Captured Personnel*, ARMY LAW., June 1999 at 1, 14 (combatants, as privileged belligerents, are entitled to "a blanket of immunity for their pre-capture warlike acts"); Georg Schwarzenberger, *Human Rights and Guerrilla Warfare*, 1 ISR. Y.B. HUM. RTS. 246, 246 (1971); Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT'L L. 205, 212 (1977) ("those who are entitled to the juridical status of 'privileged combatant' are immune from criminal prosecution for those warlike acts which do not violate the laws and customs of war but which might otherwise be common crimes under municipal law."); Solf & Cummings, *supra*, at 215 n.54 ("Those who are properly entitled to prisoner of war status receive this immunity."). Article 56 of the Lieber Code was applied during the Civil War and even prohibits prosecution for treason or other crimes against the State. Lieber Code, *supra*, at 17.

36. See, e.g., Paust, *supra* note 1, at 8 n.16; see also *supra* note 33 and accompanying text.

37. See Paust, *supra* note 1, at 12 n.26, 15, 25-26; LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW 241, 250-51 (2002); *supra* note 9 and accompanying text; see also Margaret Graham Tebo, *Qualified Praise: ABA Reps See Things They Like in Tribunal Rules, Still Have Some Legal Concerns*, A.B.A. J., May 2002, at 59 [hereinafter Tebo, *ABA Reps*] (Neal R. Sonnet, chair of the ABA

exists under either the President's Military Order or the DOD Order. Indeed, a "Review Panel" under the DOD rules consists of three military officers who generally remain under orders from the President, the DOD, and various others within the military who have command authority. As noted above, presumably only one member of the Review Panel must be a lawyer, since only one member must "have experience as a judge." The Review Panel, a majority of whom might be non-lawyer officers, is also under specific orders to "disregard any variance from procedures specified in this [DOD] Order or elsewhere that would not materially have affected the outcome of the trial before the Commission."³⁸ The Panel does not have the power to order, reverse, or amend anything and its "recommendations" are subject to "review" merely by the Secretary of Defense or the President. What has been set up is, thus, hardly a system for fair, competent, meaningful, impartial, viable appellate review by a competent, independent, and impartial court of law or tribunal exercising judicial functions. The DOD system does not even pretend to match the normal appellate process available in the U.S. military justice system, which may include review by a court of criminal appeals, further review by a court of appeals of the Armed Forces, and further possible review (by habeas corpus or otherwise in Article III courts). Moreover, section 7(B) of the DOD Order might actually preclude use of the "Review Panel," since even use of such a Panel is inconsistent with the President's Military Order, which requires review only by the Secretary or the President.³⁹

Criminal Justice Section, expressed concerns over the lack of "appeals to a civilian court" and Evan A. Davis, President of the Association of the Bar of the City of New York, stated, "We feel that it's very important that the final word rest with Article III judges as the Constitution provides.").

38. DOD Order, *supra* note 2, § 6(H)(4). In sharp contrast, the Appeals Chamber of the International Criminal Court can reverse or amend a decision or sentence or order a new trial if it "finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error." Rome Statute of the International Criminal Court, July 17, 1998, art. 83(2), U.N. Doc. A/Conf.183/9, available at <http://www.un.org/law/icc/statute/romefra.htm>. As noted, the Bush military Review Panel can only "return" a case to the "Appointing Authority" if a majority of the panel (who could be non-lawyers) decides that "a material error of law occurred" and the panel is ordered to disregard any variance from procedures that would "not materially have affected the outcome." See DOD Order, *supra* note 2, § 6(H)(4).

39. See Paust, *supra* note 1, at 15.

IV. DENIAL OF THE RIGHT TO TRIAL BEFORE A REGULARLY CONSTITUTED, COMPETENT, INDEPENDENT, AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

Prosecution before the military commissions will also constitute denial of the customary and nonderogable right to prosecution before a regularly constituted, competent, independent, and impartial tribunal established according to law.⁴⁰ Under the DOD rules, military commissions "shall consist of at least three but no more than seven members,"⁴¹ all of whom must be military officers,⁴² and only one of whom, the "Presiding Officer," must be a lawyer.⁴³ Under the rules, there is no procedure for challenging a member of the commission for cause, although the "Appointing Authority may remove members or alternative members for good cause."⁴⁴ The Presiding Officer shall admit evidence that he or she considers "would have probative value to a reasonable person," but a majority of the commission (all of whom could be non-lawyers) can overrule the Presiding Officer on such questions.⁴⁵ The majority of the members of the commission could be under chains of command outside the chain of command that exists for lawyers within the Judge Advocate

40. See, e.g., *id.* at 10–13, 15 n.34, 17 n.39; Amnesty Int'l, Memorandum, *supra* note 11, at 53–54 & n.198 ("an absolute right that may suffer no exception") (quoting *Gonzalez del Rio v. Peru* (263/1987), Oct. 28, 1992, Report of the Human Rights Committee, vol. II, at 20, U.N. Doc. A/48/1993 (1993)); Report of the Human Rights Committee, *supra*, at 25–26.

41. DOD Order, *supra* note 2, § 4(A)(2). "Number of Members. Each Commission shall consist of at least three but no more than seven members, the number being determined by the Appointing Authority. For each such Commission, there shall also be one or two alternate members, the number being determined by the Appointing Authority." *Id.*

42. *Id.* § 4(A)(3).

"Qualifications. Each member and alternate member shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause."

Id.

43. *Id.* § 4(A)(4). "Presiding Officer. From among the members of each Commission, the Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force." *Id.*

44. *Id.* § 4(A)(3).

45. *Id.* § 6(D)(1).

"Admissibility. Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person."

Id.

Generals' Corps; and, in any event, all members of the commission will be subject to lawful military orders, lawful portions of the DOD Order and the President's Military Order, and lawful portions of other orders of the President.⁴⁶ The deliberate plan is that military commissions will not be constituted or operate in the same manner as general courts-martial and conviction and sentencing can be approved by a percentage of members of a commission that is less than that required in federal district courts or courts-martial,⁴⁷ thus constituting a denial of equal protection as required by international law. The lack of minimum procedural guarantees strictly required by international law also assures that the military commissions have not been designed to be fair, competent, independent, and impartial tribunals.

V. DENIAL OF THE RIGHTS TO FAIR PROCEDURE AND FAIR RULES OF EVIDENCE

With respect to procedural guarantees, the DOD rules permit hearsay, unsworn written statements, and other evidence that would be inadmissible in U.S. federal courts or courts-martial and deny the right to confrontation or examination of all witnesses against an accused. The chair of the ABA Criminal Justice Section has expressed criticism, shared by other ABA representatives, of "the decision to relax the rules of evidence so as to admit anything 'that a reasonable person would find probative.'"⁴⁸ Cross-examination of witnesses against the accused is only

46. See Paust, *supra* note 1, at 15 n.34 (regarding relevant British and Canadian military justice system violations of human rights and denial of justice); *Morris v. United Kingdom*, 34 Eur. Ct. H.R. 52, para. 75 (2002) ("risk of outside pressure being brought to bear on the two relatively junior serving officers who sat on the applicant's court-martial . . . [who] had no legal training . . . [and] remained subject to army discipline and reports" were factors contributing to the lack of independence and impartiality in violation of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

47. See DOD Order, *supra* note 2, § 6(F)–(G). A two-thirds vote will suffice "except that a sentence of death requires a unanimous affirmative vote of all of the members." *Id.* § 6(F). However, this scheme is inconsistent with the President's Military Order, which would allow imposition of a death sentence by a two-thirds vote. See Paust, *supra* note 1, at 18 n.39. Thus, section 7(B) of the DOD Order, stating that the President's Military Order "shall govern" in the event of any inconsistency, seems to require use of merely a two-thirds vote for any sort of conviction and sentencing. DOD Order, *supra* note 2, § 7(B).

48. Tebo, *ABA Reps.*, *supra* note 37, at 59. Section 6(D)(1) of the DOD Order provides the focus for this criticism. DOD Order, *supra* note 2, § 6(D)(1); see also National Association of Criminal Defense Lawyers (NACDL), Resolution of the Board of Directors (May 4, 2002), available at <http://www.nacdl.org> ("[T]he procedures announced . . . on March 21, 2002, are . . . inadequate as a matter of fundamental fairness" and "do not comply with the provisions of the Manual for Courts-Martial."). Also consider the remarks of Don Rehkopf, Co-Chair of the Military Law Committee of the National Association of Criminal Defense Lawyers, in Seelye, *Pentagon*, *supra* note 30 (rules of the tribunals are stacked against the defendants).

authorized with respect to witnesses “who appear before the Commission.”⁴⁹ Witnesses can also provide testimony “by telephone, audiovisual means, or other means,”⁵⁰ thus placing in jeopardy the rights of confrontation and cross-examination of witnesses. Confrontation and cross-examination are also jeopardized by allowance of witness testimony by “introduction of prepared declassified summaries of evidence,”⁵¹ “testimony from prior trials and proceedings,”⁵² “sworn [and even] unsworn written statements,”⁵³ and “reports.”⁵⁴ Such rules of procedure and evidence are clearly contrary to customary human rights law and other international laws concerning confrontation and examination of witnesses which require, at a minimum, that every accused have the right “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”⁵⁵

49. DOD Order, *supra* note 2, § 5(I) (“The Accused may have Defense Counsel present evidence at trial in the Accused’s defense and cross-examine each witness presented by the Prosecution who appears before the Commission.”); *id.* § 6(D)(2)(c) (“Examination of Witnesses. A witness who testifies before the Commission is subject to both direct and cross-examination.”).

50. *Id.* § 6(D)(2)(a).

“Production of Witnesses. The Prosecution or the Defense may request that the Commission hear testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Commission may also summon and hear witnesses on its own initiative. The Commission may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating weight to be given to the testimony of the witness.”

Id.

51. *Id.* § 6(D)(2)(d).

“Protection of Witnesses. The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in Section 6(D)(5)(a), in determining the appropriate methods of receiving testimony and evidence The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.”

Id.

52. *Id.* § 6(D)(3). “Other Evidence. Subject to the requirements of Section 6(D)(1) concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.” *Id.*

53. *Id.*

54. *Id.*

55. See, e.g., ICCPR, *supra* note 9, art. 14(3)(e), 999 U.N.T.S. at 176; Paust, *supra* note 1, at 10, 14 & n.32. The International Criminal Tribunal for Former Yugoslavia has allowed depositions, but the general rule is that a witness must be physically present before the Tribunal. When depositions are used “in exceptional circumstances and in the interests of justice,” there must be reasonable notice to the accused of a putative deposition, “who shall have the

VI. DENIAL OF THE RIGHT TO COUNSEL AND TO EFFECTIVE REPRESENTATION

The right of an accused to legal counsel of choice might be in jeopardy by DOD rules providing that civilian attorneys of the accused's own choosing must be a U.S. citizen; "must be admitted to the practice of law in a [s]tate, district, territory, or possession of the United States, or before a Federal court;" and must have been "determined to be eligible for access to information classified at the level of secret or higher."⁵⁶ A JAG officer will be assigned as a Detailed Defense Counsel for each accused,⁵⁷ but civilian defense counsel can be precluded from "closed Commission proceedings" and denied "access to any information protected under section 6(D)(5),"⁵⁸ thus raising serious issues concerning full enjoyment of the right to free choice of counsel and the right to be tried in one's presence and to adequately defend oneself through legal assistance of one's own choosing.⁵⁹

VII. A RECENT FEDERAL COURT DECISION CONCERNING HABEAS CORPUS

At least one of the violations of international law discussed above could be avoided through the proper involvement of Article III courts. Although the Bush Administration has attempted to deny habeas corpus review to the detainees at Guantanamo, in violation of international law,⁶⁰ a proper interpretation of the habeas corpus statute requires that habeas corpus be available. A federal district court in California, however, has denied habeas corpus relief with respect to detainees at

right to attend the taking of the deposition and cross-examine the person whose deposition is being taken," the witness testimony must be under oath and the witness must be informed "that he is liable to prosecution for perjury in case of false testimony," and "testimony must be given in the physical presence of the Presiding Officer [appointed by the Trial Chamber] unless the chamber decides otherwise." Lal Chand Vohrah, *Pre-trial Procedures and Practices*, in 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 479, 532-34 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000); see also Christine Chinkin, *The Protection of Victims and Witnesses*, in 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, *supra*, at 451, 462 (accused must have "the opportunity to confront and examine all witnesses").

56. DOD Order, *supra* note 2, § 4(C)(4).

57. See *id.* § 4(C)(2)-(4).

58. See *id.* §§ 4(C)(3), 6(B)(3), 6(D)(5).

59. See, e.g., Paust, *supra* note 1, at 10-14; Amnesty Int'l, Memorandum, *supra* note 11, at 56-57. See generally M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 963, 967-68 (1996); GERT-JAN G.J. KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 221, 238-43 (2002).

60. See discussion *supra* Part II.

Guantanamo,⁶¹ in part because of a peculiar reading of the statute.⁶² The district court seemed to strain against the ordinary meaning of the word “jurisdiction” and added a word that Congress had not chosen, i.e., the word “territorial,” as a limitation of “jurisdiction” or power.⁶³ The district court also focused on another word that Congress had not chosen to place in the statute, the word “sovereignty.”⁶⁴

The statutory language simply cannot support such a perverse reading. Indeed, the statute focuses on “jurisdiction” of courts, not territory or sovereignty of the United States, and the district court seemed to confuse the meaning of the statute with issues concerning the reach of the Constitution. As noted, the statute expressly reaches violations of laws other than the Constitution.⁶⁵

The district court stated that detainees at Guantanamo were at all times outside the “sovereign territory” of the United States and that no federal court can address a habeas petition unless Guantanamo Bay “is under the sovereignty” of the United States, adding a conclusion that “there is a difference between territorial jurisdiction and sovereignty”⁶⁶ Of course, all that the statute requires is “jurisdiction.” What the court failed to address is that sovereignty is a form of lawful governmental power and that wherever the United States detains individuals, it is

61. *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002).

62. 28 U.S.C. § 2241 (1994). Relevant portions of the habeas corpus statute state that “writs of habeas corpus may be granted by the Supreme Court, any [J]ustice thereof, the district courts and any circuit judge within their respective jurisdictions” with respect to persons “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. §§ 2241(a), (c)(3). The phrase “laws . . . of the United States” will include customary international law. *See generally* JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 5–9, 40–42 nn.44–45, *passim* (1996). Regarding treaties, *see* JORDAN J. PAUST, JOAN M. FITZPATRICK & JON M. VAN DYKE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 194 (2000) (habeas corpus statute executes treaties for habeas petition purposes).

63. *Coalition of Clergy*, 189 F. Supp. 2d at 1049–50.

64. *See id.* This appears to be an attempt at judicial amendment of a federal statute in violation of the separation of powers.

65. 28 U.S.C. § 2241(c)(3); *see also* *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (habeas to challenge the lawfulness of an act of Congress, validity of the act was upheld under congressional power to forbid entrance into the United States to foreign persons); *Ma v. Ashcroft*, 257 F.3d 1095, 1095 (9th Cir. 2001) (habeas claim that statute violated ICCPR); *Beazley v. Johnson*, 242 F.3d 248, 263–67 (5th Cir. 2001) (claim under human rights treaty); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1007 (9th Cir. 2000) (detainee claiming human rights violation can bring habeas petition to challenge extradition); *Beharry v. Reno*, 183 F. Supp. 2d 584, 603–04 (E.D.N.Y. 2002) (habeas claim for relief under principles of international law). Another set of cases involves habeas claims of violation of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. *See, e.g.*, *Breard v. Greene*, 523 U.S. 371, 373–75 (1998).

66. *Coalition of Clergy*, 189 F. Supp. 2d at 1048.

exercising a form of sovereign power.⁶⁷ Additionally, Guantanamo Bay is under the sovereign power and a form of territorial jurisdiction of the United States: under a treaty with Cuba that confers “complete jurisdiction and control over and within such areas”—and, thus, sovereignty—and as an occupying power.⁶⁸ The district court was also misleading in stating that “‘jurisdiction and control’ is [not] equivalent to ‘sovereignty’” because the treaty recognizes “complete” jurisdiction and control in the United States, not merely “jurisdiction and control” (which would also suffice since the United States fully exercises sovereign power, jurisdiction, and control at Guantanamo Bay over the detainees).

In any event, the statute’s word “jurisdiction” is met by the treaty (i.e., the United States has “complete jurisdiction and control” and is fully exercising it) as well as by the status of the United States as occupying power with jurisdiction and control. Furthermore, there is a long history of cases allowing the use of habeas corpus with respect to U.S. nationals and foreign accused situated outside U.S. sovereign territory and outside the territory where a particular district court sits.⁶⁹ Thus, the statute cannot be so narrowly read as to limit habeas corpus to circumstances where a petitioner is physically located within a territory in which the district court sits or within “sovereign territory” of the United States. Indeed, “jurisdiction” can be extraterritorial, and should be inter-

67. Indeed, ultimate “sovereignty” is retained by the people of the United States, but the government exercises delegated sovereign power here or abroad. *See* U.S. CONST., pmbl., amends. IX, X; PAUST, *supra* note 62, at 329–31, 333–35, and references cited.

68. *See* Paust, *supra* note 1, at 25 & n.70 (discussing the treaty regime providing “complete jurisdiction and control” by the United States over Guantanamo Bay). Cuba merely has “ultimate sovereignty” under the treaty and, by implication, the U.S. must also have some form of sovereignty or sovereign power by treaty. *See id.* Thus it is misleading to state that “Cuba explicitly retained sovereignty.” Coalition of Clergy, 189 F. Supp. 2d at 1049. Prior to the treaty, the United States had been an occupying power of Cuba.

69. *See, e.g., Ex parte Hayes*, 414 U.S. 1327, 1328–29 (1973) (granting habeas review to U.S. serviceman stationed in Germany); *Grisham v. Hagan*, 361 U.S. 278, 278–79 (1960) (civilian employee of the U.S. Army, stationed in France, convicted of a capital offense); *McElroy v. United States ex rel. Guaglardo*, 361 U.S. 281, 282–83 (1960) (same, for non-capital cases); *Reid v. Covert*, 354 U.S. 1, 4 (1957) (dependents of U.S. military personnel stationed abroad); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 n.3 (1955) (Air Force serviceman “should not have been carried to Korea for trial without a hearing”); *Burns v. Wilson*, 346 U.S. 137, 138–39 (1953) (affirming the availability of habeas review in military cases but limiting the scope of review); *In re Yamashita*, 327 U.S. 1, 4–8 (1946) (Japanese prisoner of war under death sentence imposed by a military commission abroad); *Nishimura Ekiu v. United States*, 142 U.S. at 660 (alien on a Japanese vessel who had been prevented from landing); *United States v. Jung Ah Lung*, 124 U.S. 621, 622–23, 626–30 (1888) (alien on ship in San Francisco harbor); *Chew Heong v. United States*, 112 U.S. 536 (1884) (alien on U.S. ship in San Francisco harbor); *Kinnell v. Warner*, 356 F. Supp. 779, 780–81 (D. Haw. 1973) (Navy serviceman at sea aboard U.S. aircraft carrier); *see also Brownell v. Tom We Shung*, 352 U.S. 180, 183 (1956) (granting habeas review to an excluded alien without “entry”); *Chen v. Carroll*, 858 F. Supp. 569, 573 (E.D. Va. 1994) (same).

preted with respect to international law.⁷⁰ The statute's use of the word relates to the jurisdiction of a court.

Moreover, federal statutes must be interpreted consistently with international law and, in case of an unavoidable clash between a federal statute and international law, international law will prevail unless there is a clear and unequivocal intent of Congress to override international law.⁷¹ In this case, international law requires the availability of habeas corpus⁷² and there is no clear and unequivocal intent of Congress to override international law. Even if there had been such an intent, international law concerning the right to habeas corpus would prevail under either the "rights under treaties" exception (guaranteeing the primacy of "rights under" a treaty)⁷³ or the "war powers" exception (guaranteeing the primacy of international law in the context of war)⁷⁴ to the "last in time" rule.

At the time of this writing, *Coalition of Clergy* is on appeal to the Ninth Circuit and other petitions have been filed on behalf of the detainees at Guantanamo.⁷⁵ Thus, the Ninth Circuit and other federal courts have an opportunity to read the word "jurisdiction" in the habeas

70. See, e.g., PAUST, *supra* note 62, at 387–88.

71. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963); *Cook v. United States*, 288 U.S. 102, 120 (1933); *United States v. Payne*, 264 U.S. 446, 448 (1924); *Chew Heong*, 112 U.S. at 539–40, 549–50; *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[a]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate . . . rights . . . further than is warranted by the law of nations . . .") (emphasis added); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1465, 1468 (S.D.N.Y. 1988); PAUST, *supra* note 62, at 99, 105, 107–08, 418; PAUST, FITZPATRICK & VAN DYKE, *supra* note 62, at 142, 345–59.

72. See *supra* Part II.

73. See, e.g., *Jones v. Meehan*, 175 U.S. 1, 32 (1899); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 247 (1872); *Reichart v. Felps*, 73 U.S. (6 Wall.) 160, 165–66 (1867); *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 89 (1867); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 749, 755 (1835); PAUST, *supra* note 62, at 86–87, 99, 116–17; see also *The Charming Betsy*, 6 U.S. (2 Cranch) at 118.

74. See, e.g., *United States v. Macintosh*, 283 U.S. 605, 622 (1931) (dictum) (international law imposes qualifications and limitations in the context of war that bind Congress); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 314–16 (1870) (Field, J., dissenting) ("The war powers of the government have not express limitation in the Constitution, and the only limitation to which their exercise is subject is the Law of Nations . . . The power to prosecute war . . . is a power to prosecute war according to the law of nations, and not in violation of that law. The power to make rules . . . is . . . subject to the condition that they are within the law of nations. There is a limit . . . imposed by the law of nations, and [it] is no less binding upon Congress than if the limitation were written in the Constitution."); 11 Op. Att'y Gen. 297, 299–300 (1865) (Congress cannot abrogate or authorize an infraction of the laws of war, nor can the Executive); PAUST, *supra* note 62, at 88, 95, 99, 120; see also *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (opinion of Chase, J.) (war's "extent and operations are . . . restricted and regulated by the . . . law of nations").

75. See, e.g., *Shafiq Rassul v. Bush*, No. CV: 02-0299 (CKK)(D.D.C. 2002).

statute far less restrictively and in a manner that mirrors other judicial decisions recognizing the propriety of habeas corpus petitions with respect to individuals located outside the territory of the United States and that allows the United States to comply with international law. By granting habeas review, one does not guarantee a particular decision on the merits of a claim. For example, if a person can be lawfully detained without trial,⁷⁶ the granting of habeas review simply assures judicial consideration of the lawfulness of an executive decision to detain the petitioner. Yet, judicial consideration would save the United States from one of the numerous violations of international law implicated by the Military Order and DOD Rules.⁷⁷

VIII. CONCLUSION

Implementation of the President's Military Order and the ad hoc DOD rules of procedure and evidence created on March 21st will necessarily involve serious and patent violations of human rights, the laws of war, and various other international laws. Various rules of procedure and evidence, if not patently illegal, are problematic. The military commission and "review" processes that have been designed are not in the best interests of the United States. Their use may give rise to state responsibility of the United States under international law, and also to individual criminal⁷⁸ and civil⁷⁹ responsibility for those who have designed or implemented the system or who are otherwise complicit in violations of human rights, laws of war, and other international laws. What resonates more than details of deprivation, intended or foreseen, is the grating, mean-spirited, and ultimately anti-American tone of the entire effort.

76. See *supra* Part II.

77. Additionally, since the Executive cannot suspend habeas corpus without approval from Congress, following the Military Order and DOD Rules would threaten the balance and separation of powers and would be unconstitutional. *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (there is a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction"); see Paust, *supra* note 1, at 21–26. Thus, the independence of the judiciary and the separation of powers can be preserved only by allowing habeas review in spite of the Military Order and DOD Rules to the contrary.

78. See, e.g., Paust, *supra* note 1, at 4 n. 12, 10 n.18, 28 n.81.

79. See, e.g., Alien Tort Claims Act, 28 U.S.C. § 1350 (1994); Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–80 (1994). See generally JORDAN J. PAUST, M. CHERIF BAS-SIOUNI, ET AL., *supra* note 34, at 849–50; Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351, 360–70, 378 (1991).